Supreme Court, U.S.
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No. 85-301

In The Supreme Court of the United States

OCTOBER TERM, 1985

AMEY, INC. and JOHN C. AMIS, JR.,

Petitioners,

v.

GULF ABSTRACT & TITLE, INC., a Florida Corporation; HENDERSON, FRANKLIN, STARNES & HOLT, P.A., a Florida Professional Corporation; LEE COUNTY BANK, a Florida Banking Corporation; NCNB NATIONAL BANK OF FLORIDA, f/k/a EXCHANGE BANK OF LEE COUNTY, a Florida Banking Corporation; ALLEN, KNUDSON & SCHWARTZ, a Florida Partnership; BARNETT BANK, a Florida Banking Corporation; GOLDBERG, RUBENSTEIN AND BUCKLEY, P.A., a Florida Professional Corporation; FIRST NATIONAL BANK, a Banking Corporation; and ALDERMAN & TAMINOSIAN, P.A., a Florida Professional Corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly affirmed the District Court's grant of summary judgment relating to petitioners' price-fixing claim, where petitioners were afforded an adequate opportunity to conduct discovery and the evidence developed demonstrated that no genuine issue of material fact was ever presented.
2. Whether the Court of Appeals properly affirmed the District Court's exercise of its discretion in limiting petitioners' discovery, where petitioners were allowed to take the depositions of all respondents and its own witnesses, and where the refused discovery was held to entail only cumulative parallel conduct evidence concerning the price-fixing claim.

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RESPONDENTS' BRIEF IN OPPOSITION

The opinions below are reproduced in Petitioners' Appendix. The district court order of July 27, 1982 granting summary judgment in favor of respondent Alderman & Taminosian, P.A. is reproduced herein as Appendix A. Respondents accept Petitioners' statement of jurisdiction.

Respondents have supplemented the statutes involved and restated the questions as hereinbefore stated.

Statutes Involved

Rule 56(e), Fed.R.Civ.P., 28 U.S.C. Civ. Pro. 56(e) provides:

> (e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

STATEMENT OF THE CASE

The petitioners have had a running dispute with Lee County Bank and the Henderson Franklin law firm since 1976. This dispute stemmed from the petitioners' dissatisfaction with the title opinion furnished by Henderson Franklin to Lee County Bank in connection with a mortgage obtained by the petitioners to fund the purchase of real property. The Florida state courts resolved this dispute against the petitioners. *Amey, Inc.* v. *Henderson, Franklin, Starnes & Holt*, 367 So. 2d 633, 635 (Fla. 2d DCA), *cert. denied*, 376 So. 2d 68 (Fla. 1979).

The petitioners presented essentially the same injury to the federal courts, reformulated as an antitrust price fixing claim against the respondent banks, law firms and abstract company. The Court of Appeals and the district court reached the same conclusions: the petitioners failed to present a shred of credible evidence that linked the respondents together in an antitrust conspiracy, and the record convincingly established that further discovery would not produce a genuine issue of material fact. *Amey, Inc.* v. *Gulf Abstract & Title, Inc.*, 564 F. Supp. 1121 (M.D. Fla. 1983), *aff'd*, 758 F. 2d 1486 (11th Cir. 1985).

The discovery conducted by the parties demonstrated that the sources of information consulted by the petitioners in filing this action were woefully insufficient. The evidence adduced makes it apparent that the petitioners chose the co-defendants of Lee County Bank and Henderson, Franklin, not on the basis of any evidence of wrongdoing, but rather purely on the basis of misinformation about their size and prominence in real estate title opinion work or financing.

For example, the Alderman & Taminosian law firm was made a party because of petitioners' misapprehension that the firm regularly performed legal services for the First National Bank of Fort Myers. The petitioners refused to dismiss Alderman & Taminosian from the lawsuit, notwithstanding incontrovertible evidence that the law firm *never* had any such relationship with that bank and the firm's inclusion was the

result of a reckless mistaken identification by Petitioners' counsel.[1]

The Court of Appeals and the district court, in unison, rejected the petitioners' price-fixing claim because the record was "wholly insufficient to support an inference that the defendants conspired either to fix or stabilize attorney's fees." 758 F.2d at 1504-06; 564 F. Supp. 1127-30. The Court of Appeals applied the legal standard announced in this Court's decision in *First National Bank of Arizona* v. *Cities Services, Co.*, 391 U.S. 253 (1968) and in *Southway Theatres, Inc.* v. *Georgia Theatre Co.*, 672 F.2d 485 (5th Cir. 1982) when it granted the respondents' motions for summary judgment. Consistent with *Cities Service* and *Southway Theatres*, the Court of Appeals determined that the circumstantial evidence of parallel pricing and other "evidentiary acts" identified by the petitioners did not suffice to generate a triable issue of fact concerning the existence of an agreement by the alleged co-conspirators to manipulate the market prices or engage in unlawful concerted horizontal activity accomplished through an exchange of price information. 758 F.2d at 1492, 1505; 564 F. Supp. at 1127-30.

Additionally, the Court of Appeals, following the ruling of *Cities Service*, concluded that the district court did not abuse its discretion in curtailing petitioners' requests for additional written discovery in view of the numerous depositions taken by the petitioners of senior officials of each of the respondents; the deposition testimony of petitioner and the petitioners' former attorney, T. Rankin Terry; and the petitioners' failure to identify additional evidence that was more than cumulative evidence of parallel pricing. 758 F.2d at

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1. In a separate Order dated July 7, 1982, the district court granted summary judgment for respondent Alderman & Taminosian, P.A., ruling that the petitioners had failed to provide any factual support for their assertion that this respondent "performed legal services in connection with commercial mortgage loans on an exclusive basis for First National Bank of Ft. Myers pursuant to an agreement." The district court specifically concluded that, "[T]he record indicates irrefutably that plaintiffs simply sued the wrong defendants." Appendix A.

1505-06; 564 F. Supp. at 1126-27, & n. 5, citing Transcript of Hearing, June 24, 1982, at 18.

The Court of Appeals carefully reviewed the record and concluded that the district court did not abuse its discretion in curtailing discovery, noting that the petitioners were provided "more than an adequate opportunity to engage in discovery on all issues" in the complaint. 758 F.2d at 1505. In response to interrogatories propounded by Lee County Bank, the petitioners named T. Rankin Terry as a principal source of evidence of the existence of an unlawful conspiracy. 758 F.2d at 1506. During extensive depositions, Terry denied or failed to support any knowledge of the existence of a conspiracy. 758 F.2d at 1506; 564 F. Supp. at 1128-296, nns. 11,12.

The district court allowed the petitioners to proceed with all the depositions they had noticed, but stayed discovery relating to petitioners' request for documents and interrogatories only after petitioners could not specify the relevance of the evidence sought. 564 F. Supp. at 1126-27 & n.5. In complete agreement with the district court, the Court of Appeals concluded that no basis existed for finding that petitioners' interrogatories would reveal the existence of a price fixing agreement, "especially where the petitioners' star witness had denied actual knowledge of the existence of such an agreement." 758 F.2d at 1506; 564 F. Supp. at 1128 n. 12, 1130.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Court of Appeals fully considered and correctly decided the issues in affirming summary judgment for the respondents

Summary judgment is appropriate when there is no evidence other than speculation to support the allegations in the complaint. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968); *Universal Brands, Inc.* v. *Phillip Morris, Inc.*, 546 F.2d 30 (5th Cir. 1977). Petitioners' conclusional allegations of antitrust violations supported by T. Rankin Terry's (petitioners' former attorney) skant speculations do not suffice to defeat a motion for summary judgment. *Southern Concrete Co.* v. *United States Steel Corp.*, 535 F.2d 313, 318 (5th Cir. 1976), *cert. denied* 429 U.S. 1096 (1977). Likewise Judge William Lamar Rose's affidavit consisting of conclusional hearsay speculations does not rebut the substantial evidence confirming that the respondents' conduct was independent and unilateral.[2] Rule 56(e), (f), Fed. R. Civ. P.; *see Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 160-161 (1970); *Broadway* v. *City of Montgomery, Alabama*, 530 F.2d 657, 661 (5th Cir. 1972). Moreover, proof of an antitrust conspiracy is not sufficient if it is based wholly on a series of inferences. *Aladdin Oil Co.* v. *Texaco, Inc.*, 603

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2. Petitioners' rely heavily on the affidavit of Judge Rose and devote much space to reciting it in the Petition. Petition at 13-15, n.2. Judge Rose's Affidavit consists of unsupported hearsay speculations: (1) socio-demographic trends: "in the past fifteen years, Ft. Myers and Lee County have quadrupled in population and the vast majority come to this area to live and therefore looking to buy either a home or business or both"; (2) general rumor: "it was a known and understood fact that the defendant/law firms were the attorneys for the defendant/banks and the defendant/abstract companies furnished a greater number of the title services . . ."; and (3) general conclusions—"the exclusive associations . . . operated in a way as to chill, stifle and prevent competition. . . " and "enjoyed a monopolistic hold in this area." None of these assertions comply with the evidentiary requirements of Rule 56. Contrary to Petitioners' assertion, review of Judge Rose's affidavit makes it plain that Petitioners' prospect of creating a triable issue of fact is meritless.

F.2d 1107, 1112 (5th Cir. 1979); *Comfort Trane Air Conditioning Co.* v. *Trane Co.*, 592 F.2d 1373, 1384 (5th Cir. 1979).

A. Petitioners' application for review rests only on questions of evidence and factual findings

All of Amey's claims of unlawful horizontal concerted action hinge on the existence of an alleged unlawful agreement among the respondents to suppress competition. 758 F.2d at 1506. The only evidence claimed by the petitioners to relate to this point is the testimony of petitioner and T. Rankin Terry, petitioners' former attorney. This testimony hardly supports petitioners' contentions. In fact it refutes the existence of an unlawful agreement. Petitioner testified he had no proof of an agreement or of joint action by the respondents. 758 F.2d at 1506; 564 F. Supp. at 1128, n.12; Amis Dep., Vol. 1, at 105, 111-112. Petitioner admitted in deposition testimony that respondent Gulf Abstract's fee schedule did not control anything. Amis Dep., Vol. 1 at 33-34. Petitioners' only evidence of an agreement in furtherance of an unlawful conspiracy consists of hearsay statements made by his former attorney, T. Rankin Terry, the existence of defendant Gulf Abstract's fee schedule for title work, and speculations derived from respondents' opportunities to conspire at professional or social meetings. 758 F.2d at 1506; 564 F. Supp. at 1128, n.12; Amis Dep., Vol. 1 at 24-25, 32, 36-40, 77, 104-11, 155-57, 173, 175-76, Vol. 2 at 4, 24-25, 33, 38-39, 107.

Terry testified that he had no personal knowledge or evidence of any agreement among the respondents and that his belief concerning the existence of any agreement was based exclusively on hearsay. 564 F. Supp. at 1128, n.12; Terry Dep., Vol. 1 at 134. Flatly denying any knowledge of the existence of an agreement among the bank and law firm respondents, Terry testified that, at most, he told Amis that the bank prices were pretty much the same. Terry Dep., Vol. 1 at 79-80, Vol. 2 at 349, Vol. 3 at 410.

Terry's belief that the respondents engaged in an unlawful conspiracy in violation of the antitrust laws is based almost exclusively on vague references to "common knowledge," "street talk," "rank speculation" and "hearsay evidence." 758 F. 2d. at 1506; 564 F. Supp. at 1128, n. 12; Terry Dep., Vol. 1 at 42, 68, 106-06, 124, 134, 154, 164, 165, Vol. 2 at 190. Terry conceded in deposition that he lacked knowledge of whether the "street talk" he communicated to Amis was true. 564 F. Supp. at 1128, n.12. Terry Dep., Vol. 1 at 164. Furthermore, Terry's testimony repeatedly substantiates the existence of vigorous competition. Terry Dep., Vol. 1 at 87, 133-34, Vol. 2 at 217-18, 273-74.

On the key issue of the price fixing claim, petitioners' own witness convincingly demonstrates that no triable issue was ever presented with respect to price fixing.

1. *Price Fixing.* Terry denied telling Amis that prices were fixed pursuant to an agreement and believed that Amey's price-fixing claims stem from a general observation that the prices were ordinarily the same. Terry Dep., Vol. 1 at 160; Vol. 2 at 318-321; Vol. 3 at 410. Evidence (even hearsay) of an agreement among the respondent banks and law firms to fix prices for the provision of real estate legal services is completely absent. Terry Dep., Vol. 1 at 123-24, 131.

2. *Exchange of information.* Terry conceded there is no basis for asserting that the Gulf Abstract rate card was used to establish a minimum fee for legal services, even though Gulf Abstract's rate card was widely distributed. Terry Dep., Vol. 1 at 116-124; Vol. 2 at 122. He also testified that there was so much competition that he had no reason to believe that fees were fixed, stabilized, or uniform as a result of a conspiracy among the defendants or from the dissemination of Gulf Abstract's rate cards. Terry Dep., Vol. 1 at 87, 131, 154-55; Vol. 2 at 217-18, 245, 273-74.

3. *Exclusive bilateral agreements.* Terry testified unequivocally that the banks and law firms acted independently of each other, and that legal fees were not influenced by a

joint arrangement. Terry Dep., Vol. 1 at 135-36; *see* 564 F. Supp. at 11. The evidence that fees were established independently and without consultation or agreement with other law firms or banks is not contradicted by even hearsay evidence. Terry Dep., Vol. 1 at 143-45. Terry's testimony confirms that each defendant acted independently, pursuant to its own legitimate business interests, and in competition with other banks. Terry Dep., Vol. 2 at 217-18, 273-74, 349; Vol. 3 at 410.

The testimony and affidavits of senior officials of each of the respondents also confirm that the banks and law firms acted independently of each other, and that there has never been an exclusive dealing arrangement between Lee County Bank and the Henderson Franklin law firm; Barnett Bank and the Goldberg Rubenstein law firm; NCNB National Bank of Florida f/k/a Exchange Bank and the Allen Knudson law firm; or First National Bank and the Alderman & Taminosian law firm. *See* 564 F. Supp. at 1128, n. 12; Doerr Dep. at 142, 146, 148; Schroeder and Franklin Affidavits ("Aff."); Warfield Dep. at 169-174, 177-78, 182; Goldberg Aff.; Caldwell Dep. at 66, 117-121, 126, 138-39; Edwards and Weiss Aff's.

No evidence supports a claim that the alleged bank and law firm relationships result in an unlawful restraint of free competition producing the evil of an artificially inflated price. 564 F. Supp. at 1130. Terry Dep., Vol. 1 at 134-38, Vol. 2 at 181-82, 189, 208-09. Terry acknowledged that even if one law firm is the only firm that represents a particular bank there is no basis to assume an unlawful exclusive arrangement exists. Terry Dep., Vol. 1 at 87.

B. The Court of Appeals' decision does not conflict with applicable decisions of this Court or the Courts of Appeals

Proof of an agreement to restrain trade is the first and most critical prerequisite to finding a violation of Section 1 of the Sherman Act, 15 U.S.C. §1. *Esco Corp.* v. *United States*, 340 F.2d 1000, 1007 (9th Cir. 1965). Absent a showing of

unity of purpose, common design and understanding, or a meeting of the minds of defendants in an unlawful agreement to restrain trade, summary judgment must be granted. *Weit* v. *Continental Illinois National Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982).

The allegedly conflicting decisions apply the same legal standards and are distinguishable only because of their facts. For example, in *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp., cert. granted*, 85 L.Ed. 2d 157, 105 S.Ct. 1863 (1985),[3] a question to be reviewed by this Court is whether the Court of Appeals improperly reversed summary judgment for antitrust defendants when the district court found that all the evidence is entirely consistent with the independent economic self-interest of each defendant and where the Court of Appeals did not reject that finding or consider whether defendants' actions were more consistent with an inference of conspiracy than with an inference of independent action. The Third Circuit expressly concluded,

> this case presents a record in which there is both direct evidence of certain kinds of concert of action and circumstantial evidence having some tendency to suggest that other kinds of concert of action may have occurred.

In Re Japanese Electronic Products, Antitrust Litigation, 723 F.2d at 304-05. The Third Circuit specifically identified the direct and circumstantial evidence that combined to make summary judgment inappropriate. 723 F.2d at 305-06.

Petitioners, here, completely failed to present specific facts that support a reasonable inference of concerted action. 758 F.2d at 1504-05; 564 F. Supp. at 1130. Contrary to Petitioners' bald misstatement of the case, the decisions of the Court of Appeals and the district court did not "recognize" that "respondent law firms combined to create and operate

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3. Unlike *Matsushita*, the district court and the Court of Appeals in the instant case reached the same conclusions—that petitioners had an adequate opportunity to conduct discovery, and they failed to present credible evidence showing the existence of a triable issue fact.

Gulf Abstract as a joint venture."[4] Petition at 22. The district court merely noted that a group of attorneys in Lee County incorporated respondent abstract company to fulfill a legitimate business objective: to enable the procurement of abstracts of title in a more timely fashion so as to minimize the time between the request for the title opinion and closing. 564 F. Supp. at 1129.

The prices shown on Gulf Abstract's price list were insurance premium rates, regulated by the state insurance commissioner. 564 F. Supp. at 1129; Green Dep. at 15. Gulf Abstract does not render title opinions, and its price list is unrelated to fees for professional legal services. Green Dep. at 99; Furlong Dep. at 21-22. The district court examined the record and concluded that no evidence in the record supports any contention that Gulf Abstract ever issued title opinions or produced fee schedules relating to title opinions. 564 F. Supp. at 1121. Nor is there a factual basis for inferring that attorneys in Lee County conspired to fix their legal fees on the basis of schedules of title insurance premiums prepared by abstract companies. 564 F. Supp. at 1121, 1129.

Moreover, the district court concluded that fee lists were provided by some firms to their bank clients to make it possible for the bank to know what fee would likely be charged for rendering a title opinion in a particular transaction. 564 F. Supp. at 1129; 758 F.2d at 1504; Warfield dep. at 64-68; Schwartz Affidavit. Even T. Rankin Terry conceded that

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4. This argument is not only fallacious, based on the meaning of joint venture, but is being offered for the first time in this Court. Likewise, petitioners for the first time in this Court label T. Rankin Terry as an unnamed co-conspirator. Petition at 4. This characterization of Terry at this juncture illustrates petitioners' distortions of the record in this case.

Contrary to petitioners' contention, the district court and the Court of Appeals did not impose a burden on these petitioners to "disprove the likelihood of independent activity to avoid summary judgment." Petition at 20-21. In view of the sworn denials of the defendants, the woefully insufficient testimony of petitioner and his former attorney, both courts concluded that petitioners simply failed to set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P., Rule 56(e).

there was no basis for Amey's accusation that Gulf Abstract's rates for title services were used to fix minimum fees for legal services. Terry Dep., Vol. I at 116-24, 131. Petitioners have completely failed to identify any record evidence that brings this case within the "joint venture" circumstances of *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967) or *National Collegiate Athletic Association* v. *Board of Regents of Univ. of Oklahoma and University of Georgia Athletic Association*, 82 L.Ed. 2d 70, 104 S. Ct. 2948 (1984).

C. This Court and the Courts of Appeals consistently require a plaintiff to show sufficient "plus factors" before an antitrust conspiracy may be inferred from consciously parallel conduct.

Where a plaintiff establishes no more than the existence of parallel conduct, all courts, dating back to *Interstate Circuit* v. *United States*, 306 U.S. 208 (1939), have required additional indicia of concerted action before allowing such evidence to reach a jury. Similar conduct by businesses in the same industry is not sufficient standing alone, to prove conspiracy, but is equally susceptible to the conclusion that each firm, facing the same market conditions, has made the same independent business decision. *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954). The Court of Appeals correctly applied this rule to this case, generating no conflict with decisions of this Court or other Courts of Appeals.

For example, in *Weit* v. *Continental Illinois National Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982), credit card holders sued five Chicago banks alleging that the banks conspired among themselves and with their correspondent banks to fix the interest rates they charged as member banks of a credit card system. Evidence supporting the plaintiffs' claims showed,

essentially, that each bank charged the same interest rate for the credit cards and the banks had ample opportunity to discuss interest rates at meetings of the card system member banks, annual bankers' meetings and on social occasions. 641 F.2d at 460. Affirming summary judgment, the Seventh Circuit concluded:

> parallel interest rates, together with evidence that the opportunity to conspire existed—when measured against defendants' denials, parallel economic cost factors, and the need for a compatible charge card system—does not support a rational inference of an unlawful conspiracy.

641 F.2d at 463. "Parallel behavior and the hope that something can be developed at trial is not sufficient to warrant a trial on the merits." 641 F.2d at 462.

The decisions cited by petitioners uniformly endorse the requirement of "plus factors" in parallel conduct cases. *C-O-Two Fire Equipment Co.* v. *United States*, 197 F.2d 489, 497 (9th Cir.), *cert. denied*, 344 U.S. 892 (1952) (conviction of defendants charged with price fixing supported by evidence of uniform conduct and specifically identified "plus factors"). The Court of Appeals in the instant case determined that petitioners failed to present evidence showing that the respondents' parallel business conduct was, "contrary to their economic self interest so as not to amount to a good faith business judgment." 758 F.2d at 1505 (quoting *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954)). This rule, which has been followed by an unbroken line of authority, does not amount "to judicial legislation inconsistent with Rule 56(c), Fed. R. Civ. P." Petition at 18.

Petitioners' quotation of a selective fragment of *Parks* v. *El Paso Board of Realtors*, 764 F.2d 1053, 1060, n.11 (5th Cir. 1985) reflects their strained effort to manufacture a con-

flict where none exists.[5] In *Parks* v. *El Paso Board of Realtors*, 764 F.2d at 1053, the Court applied the "plus factors" standard on the facts of that case, noting that:

> [T]his is a specific instance of the general principle that "[o]ne can infer accord from common action only if it occurs in a setting that bespeaks accord." L. Sullivan, Antitrust 315 (1977). The fact that all people eat, drink, are occasionally merry, and die is hardly evidence of a conspiracy. In order to present a jury question regarding the existence of a conspiracy, an antitrust plaintiff must establish not merely consciously parallel action but a "plus factor" that indicates an agreement. (citation omitted) Once he has met this initial burden, however—that is, once he has established a setting that bespeaks accord—then consciously parallel action is probative of the existence of a conspiracy whether or not it is potentially explicable in terms of the actor's self-interest. It is up to the jury to determine which explanation of the parallel action to accept: the explanation of conspiracies or in terms of independent business judgment.

764 F.2d at 1060, n.11. Compare Petition at 18. Petitioners failed to cite any authority that rejects the principle that in addition to parallel conduct, a "plus factor" must be shown, making it clear that no conflict among the courts exist.

Examination of *El Paso Board of Realtors* in light of *Fragale & Sons Beverage Co.* v. *Dill*, 760 F.2d 469 (3d Cir. 1985) underscores the impropriety of petitioners' claim of conflict. Petition at 21. In both cases, the plaintiff presented specific facts in support of the existence of a conspiracy. In

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5. In a further effort to manufacture a legal issue, petitioners improperly assert that their status as indirect purchasers is a basis for review by this Court. Petition at 11. The standards governing Rule 56 simply do not hinge on whether the party is an individual consumer or an unsuccessful competitor. *Cf. Reiter* v. *Sonotone Corp.*, 442 U.S. 330 (1979) (holding that direct purchasers paying a higher price for goods due to antitrust violations had standing to sue.) *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968) clarifies the rule that even in an antitrust action, a plaintiff must comply with Rule 56(e).

El Paso Board of Realtors the plaintiff, a real estate broker, introduced evidence showing specifically that other real estate brokers discriminated against him and interfered with his attempts to charge a fixed commission rather than a commission based on a percentage of the sale price of real estate. The evidence included defendants' disparaging remarks to plaintiff's prospective customers, refusal of other brokers to show the plaintiff's property listings, and testimony that a real estate agent had stated that plaintiff would not survive for long because other brokers were going to drive the plaintiff out of business. 764 F.2d at 1060. As in *Fragale*, the Court in *El Paso Board of Realtors* concluded that parallel conduct coupled with specific acts designed to eliminate the plaintiff from the market place presented a jury question. 769 F.2d at 1053.

Tunis Bros. Co., Inc. v. *Ford Motor Co.*, 763 F.2d 1482, 1490-91 (3d Cir. 1985) and *Fragale* illustrate that courts apply an established legal standard ("plus factor that indicates an agreement") to the particular evidence presented in a case; this simply does not generate a conflict justifying review of the Eleventh Circuit's decision. *See* Petition at 19-20. In *Tunis*, an antitrust plaintiff charged the defendants with illegally conspiring to terminate the plaintiffs' tractor dealership. The Court reversed summary judgment, concluding that the evidence created triable issues of fact concerning whether the defendants improperly used restrictions in a franchise agreement to restrain trade. 763 F.2d at 1497-1502. In *Fragale*, the Court reversed summary judgment in favor of the defendants because the plaintiff identified specific facts from which a reasonable inference of concerted activity could be made. 760 F.2d at 473-74.

If antitrust plaintiffs, like petitioners, fail to present evidence supporting a reasonable inference of a conspiracy, summary judgment is proper. *Terry's Floor Fashions* v. *Burlington Industries, Inc.*, 763 F.2d 604 (4th Cir. 1985). Unlike the facts in *Tunis* and *Fragale*, the plaintiff in *Terry's Floor*, could not overcome a record showing competition in the industry and independent conduct by the defendants.

This difference in factual circumstances hardly suffices to demonstrate a conflict among the Circuit Courts.

The Courts of Appeals, including the Eleventh Circuit, simply adhere to a standard requiring an antitrust plaintiff to "present 'direct or circumstantial evidence that tends to prove that defendants had a conscious commitment to a common scheme designed to achieve an unlawful objective'." *Terry's Floor Fashions*, 763 F.2d at 612; *see Monsanto, supra*. On motions for summary judgment, application of the same standard to factually distinguishable circumstances, of course, yields different results. *See also, Powers* v. *Nassau Development Corp.*, 753 F.2d 457 (5th Cir. 1985); *Moore* v. *Boating Industry Associations*, 754 F.2d 698 (7th Cir. 1985).

II. Petitioners have failed to show that the discovery order constituted an abuse of discretion.

The petitioners deposed nearly a dozen persons, including senior representatives of each respondent. 564 F. Supp. at 1126. In view of the petitioners' utter failure to specify the relevance of their additional discovery requests, the decision of the Court of Appeals does not conflict with *Adickes* v. *S.H. Kress*, 398 U.S. at 157 or *Gary Plastic Packaging Corp.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 756 F.2d 230, 236 (2nd Cir. 1985); and the decision is consistent with *Cities Service*, 391 U.S. at 288-290. *See also, Universal Brands, Inc.* v. *Phillip Morris, Inc.*, 546 F.2d at 36; *Southern Concrete Co.* v. *United States Corp.*, 535 F.2d at 318 & n.5.

Petitioners' only prospect for creating a triable issue is their pending discovery. None of the pending discovery requests seeks information that would yield any rebuttal of the defendants' sworn denials of an unlawful agreement. 758 F.2d at 1506; 564 F. Supp. at 1126-27 & n.5. When pressed to identify the additional discovery desired, the petitioners pointed to their pending interrogatories, but could not specify the relevance of the information sought. 564 F. Supp. at 1126. The interrogatories seek confidential bank file histories of residential and commercial real estate mortgage transactions, including names of banks, attorneys, title companies,

and fees and expenses connected with real estate transactions. Petitioners' document request seeks information wholly unrelated to establishing that the respondents combined unreasonably to restrain trade. It requests copies of (1) bank forms; (2) rules and regulations and procedures; and (3) identifications of loan customers.

"When the record becomes clear enough to disclose that further discovery is not needed to develop significant aspects of the case and . . . is not likely to produce a genuine issue of fact, discovery should be ended." *Aviation Specialties, Inc.* v. *United Technologies Corp.*, 568 F.2d 1186, 1190 (5th Cir. 1978); *Universal Brands Store* v. *Philip Morris, Inc.*, 546 F.2d 30, 36 (5th Cir. 1977). The Court of Appeals and the district court, in light of respondents' concession of parallel conduct, properly concluded that respondents' additional discovery requests were "mere cumulative evidence of parallel pricing and processing, matters which the banks and law firms have conceded. 758 F.2d at 1506.

CONCLUSION

The petition for writ of certiorari should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondents' Brief in Opposition has been furnished by mail this 23 day of September, 1985, to the following:

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MARILYN HOLIFIELD

Appendix A

United States District Court

FOR THE
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOHN C. AMIS, JR., et al.,
Plaintiffs,
vs.
GULF ABSTRACT & TITLE, INC., et. al.
Defendants.

Case No.
80-88 Civ Ft.M.-K

ORDER

The Court has for consideration a motion for summary judgment filed by defendant Alderman & Taminosian, P.A. on February 26, 1982. At hearing on June 24, 1982, this Court directed plaintiff to respond to the motion within fifteen days. Upon expiration of that time, defendant again moved for entry of summary judgment. Several days later, plaintiff filed a memorandum in opposition to summary judgment and moved for oral argument. Defendant has replied to plaintiff's response.

Upon review of the relevant affidavits and deposition testimony, the Court is of the opinion that no genuine issue of material fact exists, and that defendant Alderman & Taminosian is therefore entitled to judgment as a matter of law. Plaintiff has failed to provide any factual support for its assertion that this defendant performed legal services in connection with commercial mortgage loans on an exclusive basis for First National Bank of Fort Myers pursuant to an agreement. The record indicates irrefutably that plaintiff simply sued the wrong defendant.

Accordingly, plaintiff's motion for oral argument is DENIED. Defendant's motion for summary judgment should be, and it is hereby GRANTED. The Court reserves ruling on defendant's application for attorney's fees.

IT IS SO ORDERED at Tampa, Florida, on this 27 day of July, 1982.

BEN KRENTZMAN
Chief Judge